

STATE OF MINNESOTA

BUREAU OF MEDIATION SERVICES

In Re the Arbitration between

Minnesota Teamsters Public & Law
Enforcement Employees' Union, Local 320
Grievant,

and

BMS Case No.: 13-PA-0469

Ramsey County, Minnesota
Respondent.

DECISION AND AWARD

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: Labor Union Local 320:

Kevin M. Beck, Attorney at Law
Kelly & Lemmons, P.A.
7300 Hudson Blvd., Suite 200
Saint Paul, Minnesota 55128

For: Ramsey County, Minnesota:

Jean Gramling, Manager, Human Resources
Ramsey County, Minnesota
121 Seventh Place East, Suite 2100
Saint Paul, Minnesota 55101

Place of Hearing:

Saint Paul, Minnesota

Date of Hearing:

August 8, 2013

Date of Award:

October 31, 2013

Relevant Contract Provisions:

Articles 13.1; and Article 20.1

Contract Year:

January 1, 2012

Type of Grievance:

Breach of Contract: Work Procedures,
Management Rights

I. INTRODUCTION

This matter came on for a Hearing pursuant to the January 1, 2012 Collective Bargaining Agreement, hereinafter, (CBA). The Hearing occurred on August 8, 2013, at the offices of Respondent, Ramsey County Human Resources, 121 Seventh Place East, Saint Paul, Minnesota. Attorney Kevin Beck represented the Teamsters Local 320, the Bargaining Unit for Community Corrections Workers, 1, 2, and 3, hereinafter, Grievant or Grievant Bargaining Unit.

Respondent, Department of Corrections, Ramsey County, Minnesota, hereinafter, Employer, was represented by Jean Gramling, Human Resources Manager.

The Hearing proceeded in an orderly manner. The Employer raised the issue of substantive arbitrability, but the Parties agreed to proceed on the merits while the issue of arbitrability was under advisement.

There was ample opportunity for the Parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath administered by the Arbitrator. The Parties fully and fairly represented their respective positions. The Hearing was closed with the receipt of briefs by the Arbitrator on October 4, 2013.

II. STATEMENT OF JURISDICTION

This matter arises under Article 20: Grievance Procedure:

STEP 4. A grievance unresolved in Step 3 and appealed to Step 4 by the Union shall be submitted to an arbitrator subject to the provisions of Public Employment Labor Relations Act of 1971 as amended.

Grievant, the Bargaining Unit of Community Corrections Workers 1, 2, and 3 challenges the procedure used by the Employer to process a lateral transfer vacancy for a Cognitive Restructuring Group Coordinator, hereinafter Cog Coordinator. Grievant alleges breach of Article 13.1 of the CBA and the Employer's own Lateral Transfer Policy 2.2.

III. ISSUES

A. WHETHER THE GRIEVANCE PROCEDURE CAN BE USED TO CHALLENGE THE EMPLOYER’S “WAIVER” OF COMPLIANCE WITH THE COLLECTIVE BARGAINING AGREEMENT AND COUNTY POLICY 2.2?

B. WHETHER THE EMPLOYER BREACHED ARTICLE 13.1 OF THE COLLECTIVE BARGAINING AGREEMENT BY IMPLEMENTING AN ALTERNATIVE PROCEDURE FOR PROCESSING VACANCIES FOR LATERAL TRANSFERS IN THE BARGAINING UNIT?

IV. STATEMENT OF THE FACTS

Grievant is the Bargaining Unit of Community Corrections Workers (CCW) 1, 2, and 3. CCWs are primarily probation agents. They are responsible for engaging offenders and families after release in the process of change. They also monitor offenders’ compliance with Court Orders. A Bachelor’s Degree is required for all CCW positions. The Employer’s Job Class Title for CCW 1, 2, and 3 defines one of the essential position requirements:

Education

A Bachelor’s Degree in a social/behavioral science or equivalent. (No substitution for a Bachelor’s Degree)

The Respondent is Ramsey County, Minnesota Community Corrections Department which administers County Adult and Juvenile Corrections Facilities and rehabilitation programs.

Although not a party to this arbitration, it would be helpful to have a brief knowledge of the Correctional Officer (CO) position. Correctional Officers are also represented by Local 320, but are in a different bargaining unit. COs maintain the safety of inmates and staff while the offender is incarcerated. The minimum qualification for COs is a high school diploma or GED.

The position that is at issue in this arbitration is the newly created position of Cognitive Restructuring Group Coordinator, Cog Coordinator. It was posted as a lateral transfer for CCWs on January 31, 2012. The successful applicant was to develop protocols, provide support, quality assurance, and facilitate groups for cognitive restructuring for high-risk offenders. The original posting stated:

“Any employee of the Community Corrections Department who is currently employed in a position that requires the same qualifications [as a CCW] and is interested in being considered for a lateral transfer should notify...”

According to testimony from the Associate Director, the Director of the Department after reviewing the applications of the four CCWs who applied for the position in January, 2012, but before interviewing them said that she “did not like the pool.” The Associate Director testified that the Director “wanted a larger pool and people with different skills.” The Director ordered the position to be revised and re-posted. In addition, she ordered that a simultaneous search for the Cog Coordinator vacancy be conducted using the Job Mobility list.

Aware that the Director’s order was contrary to County Policy 2.2, the procedure for Lateral Transfers for CCWs, the Associate Director asked if he should prepare a Request for Exception to compliance with Policy 2.2. The Director, he testified, said: “Why should I write a memo to myself; it [the change] was my idea.” The Director did not testify.

The completion of a Request for Exception, Policy 1.3, is mandatory when compliance with a department policy cannot be met for any reason. County Policy 1.3 states in applicable part:

...

Exceptions: In the event that compliance with a departmental policy cannot be met for whatever reason, a Request for Exception shall be completed and submitted by a deputy director or superintendent to the Director for consideration.

The Director alone can grant such exceptions or issue a direction contrary to the requirements of any departmental policy.

Consequently, no Request for Exception was prepared and submitted to the Director for review. Nor did the Director ever reduce her reasons for not complying with Policy 2.2 to a written memo as required.

The Cog Coordinator position was re-posted on February 15, 2012 to the Grievant Bargaining Unit and simultaneously to the Job Mobility list. Again the posting stated:

“Any employee of the Community Corrections Department who is currently employed in a position that requires the same qualifications [as a CCW] and is interested in being considered for a lateral transfer should notify...”

Three of the four CCWs who applied in January re-applied. Two COs also applied. Contrary to Policy 2.2, the Director ordered that all the applicants be interviewed at the same time. The Successful Applicant was a CO not from the Grievant Bargaining Unit. At the time of her application, the resume of the Successful Applicant does not show that she was currently employed in a position that required the same qualifications as members of the Grievant Bargaining Unit. Nor does her resume show the attainment of a Bachelor’s Degree. The March 29, 2012 Hiring Announcement states that the Successful Applicant had an unspecified undergraduate degree in Criminal Justice. The Employer presented no evidence at the Hearing that established that the Successful Applicant met the minimum qualifications to be considered for the Cog Coordinator position.

A grievance was filed by two of the unsuccessful CCW applicants. The grievance was denied by the Employer through the grievance ladder because:

- 1) “The Department’s policies (on hiring or any other matter) are not grieveable;”
- 2) “Since the contract (CBA) is silent on how or when the

Job Mobility list can be used as part of a lateral transfer, there is no prohibition to the Employer's actions;"

- 3) "...the department has the ability to suspend its administrative policies when it deems necessary, and the fact that any re-posting of the position would result in the same outcome, the grievance is denied;"
- 4) "Departmental Director [] has full authority to explicitly waive Department policy when she determines it is in the best interest of the Department to do so...any claims of violations of the Department policy are outside the scope of the grievance process and are therefore not at issue in this matter.

This matter proceeded to arbitration on August 8, 2013.

V. RELEVANT CONTRACT PROVISIONS

ARTICLE 13 WORK FORCE

13.1 When vacancies occur within a division of the Department of Community Corrections, notices of such vacancies shall be posted at all units. Within a five (5) work day time period of the postings all employees currently working at a position requiring the same qualifications shall apply in writing setting forth his/her qualifications and reasons for transfer. All qualified, permanent, non-intermittent applicants shall be given an appointment for an interview with management staff of the unit involved. A recommendation which takes seniority into account, along with qualifications and other factors, shall then be forwarded to the Department Director or designee for final approval or disapproval. If approved, transfer is made as soon as possible since unit heads concerned are involved in procedure. If disapproved the unsuccessful applicant shall be given notice of the reason (s) for disapproval if the employee requests such notice in writing. If no permanent, non-intermittent employee is selected as a result of this process, qualified permanent intermittent employees shall then be considered following the same process as those for non-intermittent employees who have applied for transfer. To be considered, intermittent employees must have worked for the employer within the previous year, from the date of their application for transfer. The recommendation and final decision cannot be grieved.

ARTICLE 20 EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

20.1 Definition of a Grievance

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

RELEVANT COUNTY POLICIES

RAMSEY COUNTY COMMUNITY CORRECTIONS

POLICY 1.3 ORGANIZATION AND ADMINISTRATION

.....
Exceptions: In the event that compliance with a departmental policy cannot be met for whatever reason, a Request for Exception shall be completed and submitted by a deputy director or superintendent to the Director for consideration. The Director alone can grant such exceptions or issue a direction contrary to the requirements of any departmental policy.

POLICY 2.1 HIRING

Purpose

To ensure that the Department's hiring decisions are based on articulated standards, principles, and procedures that are transparent, applied consistently, and provide equitable opportunities of all employees.

Policy

All applicants, regardless of the hiring process utilized, will receive consistent, fair and equitable consideration based on appropriate criteria for the vacancy being filled.

Values to Provide Guidance throughout the Hiring Process

All individuals should have an equal opportunity. Hiring supervisors will avoid actions that could create the appearance preferential treatment of any applicant.

POLICY 2.2 LATERAL TRANSFERS

Purpose

To encourage and support employees' career growth and development and to ensure that 1) any vacancy or newly created position shall be filled and posted in accordance with the provisions of the bargaining agreement...2) that the hiring process and hiring decisions for lateral transfers are based on articulated standards, principles, and procedures that are transparent, applied consistently, and provide equitable opportunities of all employees.

Definitions

Eligibility for Lateral Transfer

1. Meets the minimum qualifications for the position,
2. Conforms to union provisions,
- 3...
- 4...

Interviewing

If there is only one lateral transfer applicant for a vacancy, the hiring supervisor may with the approval of the Deputy director for Administrative Services, decide to interview the applicant by him/herself.

Policy 2.5 Job Mobility for Correctional Officers

Purpose

To establish rules by which qualified Correctional Officers may be considered for vacant Community Corrections Worker positions that the Department's hiring decisions are based on articulated standards, principles, and procedures that are transparent, applied consistently, and provide equitable opportunities for employees.

Procedures

Supervisors will receive a list of all Correctional Officer Job Mobility candidates at the same time they receive the top ten candidates from the postings for lateral transfer for full-time, part-time, and intermittent employees if no selection was made from the lateral transfer requests. Once the decision has been made not to fill a vacancy with a lateral transfer applicant, the hiring supervisor may use the Job Mobility process and the Certified Eligible list concurrently or sequential to fill the vacancy.

VI. ARBITRABILITY

ISSUE A. WHETHER THE GRIEVANCE PROCEDURE CAN BE USED TO CHALLENGE THE EMPLOYER'S "WAIVER" OF COMPLIANCE WITH THE COLLECTIVE BARGAINING AGREEMENT AND COUNTY POLICY 2.2?

The Employer raised the issue of substantive arbitrability. It argues that its decisions involving only County Policies are not reviewable in the grievance process. Article 20.1 of the

CBA defines a grievance as “a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the Agreement.”

The CBA at 13.1 regulates the procedure for filling lateral transfers in the CCW Bargaining Unit. The normal lateral transfer process which the Employer has followed in previous vacancies until this grievance requires:

- a. vacancy posted;
- b. interested current CCWs apply;
- c. interviews of CCW applicants;
- d. a CCW is either picked for the vacancy or not; and
- e. if no CCW is chosen for the vacancy, the Employer can search for candidates among the Job Mobility list or Certified list.

On other occasions when the Employer followed this procedure and a CCW was not chosen for a vacant position, the Grievant has not grieved the Employer’s use of the secondary procedures in Article 13.1, i.e. posting the vacancy on the Job Mobility list.

Policy 2.2 outlines in exquisite detail an identical process for lateral transfers in the Grievant Bargaining Unit. The County admitted that the procedures in the County Policy 2.2 were not followed, but argued that the Director has authority to “waive” policies “in the best interest of the Department.”

The Employer argues that Grievant cannot use the grievance procedure to challenge its authority as management to “waive” established Policies at the Director’s discretion. “Hiring decisions are strictly within management’s rights to decide; therefore this matter is not grieveable.”

The Employer mis-understands the hierarchy of documents in a labor agreement. The CBA is the master document. Policies written to interpret and implement the CBA are subordinate documents. The Policies have no independent authority. All decisions made by the

Employer using **the** policies which are inconsistent with the language and intent of the CBA are reviewable as breaches of the CBA.

A labor agreement is like a brick and mortar wall. The mortar represents an employer's unlimited authority to run the business and direct the workforce as it wanted to before collaboration with a Union. The bricks represent the powers and procedures ceded or surrendered to the Union at the negotiating table. The mortar runs in narrow channels around and under the bricks. The employer can still run the business and direct the workforce, but with limitations.

Where the brick begins, management rights are limited to the provisions and procedures in the CBA. Each brick represents a separate contract article where the parties may have organized their collaborations in a different way and by a different standard. Each brick requires a case-by-case review.

The grievance process is the parties' mechanism to resolve their differences at the edge of the brick before calling in a neutral. Neither party has any other forum to resolve differences so substantive arbitrability is usually sustained.

In this case the Employer is arguing that the Director of the Department of Corrections at her discretion can "unilaterally waive, amend, alter, or eliminate any County policy at her sole discretion in the best interests of the Department." "Since," the Employer continues, "County Policies are not identical to the CBA, no breach of the CBA has occurred and the Grievant has no right to challenge the Director's decisions based solely on County Policies.

The Employer is completely incorrect. This matter can be heard in arbitration because it is a dispute over the interpretation and implementation of Policies which alter the rights of the Grievant under Article 20.1 of the CBA. In addition, the Employer's invocation of County Policy 1.3 is dispositive on the issue of substantive arbitrability. The invocation of the Request for

Exception clause is an admission that the Employer did knowingly and with intent breach the CBA and its own Policy 2.2. Whether the Employer's invocation of Policy 1.3 overrides the CBA will be decided in the discussion of this matter under the Analysis Section.

As to arbitrability, the Grievant, standing on the enforceable promises in Article 13.1 of the CBA, can use the grievance process to challenge any word of County Policies that is it feels mis-interprets the CBA.

Procedural arbitrability is foremost in this case. Article 20.1 of the CBA permits the Grievant to challenge any implementation of County policies which are inconsistent with a procedure required by the CBA. Here, the Employer admits that it implemented a different procedure for processing lateral transfers in the CCW Bargaining Unit than the procedure in Article 13.1. Therefore, Grievant can challenge the Employer's implementation of the alternative procedure used here.

No valid challenge to substantive or procedural arbitrability exists here.

VII. POSITION OF THE PARTIES

A. POSITION OF THE GRIEVANT

Past Practice Undercuts the County's Argument.

Two prior CCW vacancies were introduced into evidence: one from May 2006 and another from February 2012. The hiring process used in both instances demonstrates that the County has consistently followed the practice of first interviewing and making a hiring decision for qualified, permanent CCWs before moving to the CO Job mobility list. In fact, in 2006 the County specifically acknowledged the proper procedures in writing in response to a Union grievance identical to the one at issue in this case.

In May 2006, a CCW position was posted for a lateral transfer. *See* Jt. Ex. 15. Four individuals applied—three CCWs and one CO. The four applicants were interviewed simultaneously. Following interviews, the hiring supervisor recommended [the] CO for the vacant CCW position. *Id.* In response, the Union filed a grievance arguing that the process used by the County to fill the CCW vacancy violated the § 13.1 of the CBA. *See id.* at p. 4. The County agreed with the grievance, as summarized in an e-mail from hiring supervisor Deb Ranthum:

“Based on language in the union contract this grievance was valid and according to union rules Brian is not eligible for transfer. As a result, [the CO] will not be filling our current CCW position.”

Id. [The Associate Director] testified that [the] CO was put on the list “erroneously” because [the] CO “wasn’t eligible to apply” pursuant to the terms of the CBA. Accordingly, the job offer was retracted and the normal lateral transfer process under § 13.1 was followed. The normal lateral transfer process was described by the Union Steward as the following:

1. Vacancy is posted;
2. Interested current permanent CCWs apply;
3. Interviews are conducted;
4. A CCW is either picked to fill the vacancy or not; and
5. If not, then the vacancy can be filled via job mobility list or certified eligible list.

The normal lateral transfer process was followed in January 2012 to fill a CCW adult DWI Court vacancy. (Union Ex. 1). The timing is significant because it occurred in the same month that the Cog Group Coordinator was initially posted. Only two CCWs applied for the DWI Court vacancy and both received interviews. Because neither CCW was selected, “the county then went to the next step in the process and included CO’s with degrees.” (Union Ex. 1). A CO was ultimately hired for the position. [The] Steward testified that the County followed the proper hiring process so a grievance was not filed because there was no contract violation.

The County's argument that the policy was waived "owing to the small number of candidates applying for this position and the special desired qualifications for the position" (Jt. Ex. 4), is repudiated by its own actions when it simultaneously filled the DWI Court vacancy. In that situation, neither the small number of applicants nor the specialized skills required for the vacancy required a waiver.

In fact, a smaller number of CCWs applied for the DWI Court vacancy than the Cog Group Coordinator. Yet, despite just two applicants and the specialized skill set, the County followed the proper process under § 13.1 when it interviewed CCWs first and made a recommendation for final disapproval of those applicants *before* it "went to the next step in the process and included CO's." (See Union Ex. 1).

The timing is critical that the DWI Court vacancy was filled in February 2012, at the same time the County was interviewing for the Cog Group Coordinator vacancy. That the County followed the proper process with respect to the DWI Court vacancy proves that the "waiver" in this grievance was unnecessary, arbitrary, and capricious. Accordingly, the Grievance should be sustained and the position reposted so that the contractually-required process is followed.

B. POSITION OF THE EMPLOYER

Although the Union posited that the Department policies were subject to the authority of the CBA, department policies are not interpreted as part of the Union Contract and cannot be grieved under the Contract. [...] contract provisions are subject to negotiation with the Union, a grievance process, and binding arbitration if necessary; articles of the Labor Agreement cannot be unilaterally amended or eliminated by the Department Director.

In contrast, Departmental policies are not subject to negotiation with the Union, the Department Director can unilaterally amend or eliminate a departmental policy, and if an individual disagrees with the application of a policy, complaints are submitted to the Department Director for resolution.

All CCWs who applied were interviewed and considered. All CCWs who applied were viable candidates for this position. No CCW lost an opportunity to compete for this position. By interviewing candidates off the Mobility list concurrently with the CCWs, Management suspended Department policy. Suspensions of Department policy, however, are outside the scope of the grievance process.

The labor agreement states:

“...all qualified, permanent, non-intermittent applicants shall be given an appointment for an interview with Management staff of the unit involved.”

The contract does not state “only” qualified, permanent, non-intermittent applicants shall be given an appointment for an interview.

This is a fundamental and dispositive difference. Nothing in the labor agreement contract prevents Management from running a concurrent process with the Mobility list, so long as all CCWs are given full and fair opportunity to be hired for this position. Management has clearly satisfied the contract requirement, and has therefore not breached the labor agreement contract.

The hiring decision was made by the Deputy Director of the Adult Division. It is both inappropriate as well outside of the scope of the grievance to explain hiring decisions made by Management in this case. The Director has full authority pursuant to County Policy 1.3 to

explicitly waive Department policy when she determines it is in the best interests of the Department to do so. In this case, owing to the small number of candidates applying for this position and the special desired qualifications for the position, the Director exercised her discretion to waive the requirements for lateral transfers in County Policy 2.2. Any claims of violations of Department policy are outside the scope of the grievance process.

Article 13.1

The Employer did not violate Article 13.1 of the Labor Agreement. This Article applies to posting vacancies and interviewing regular status and intermittent CCW employees for transfer within a division in the department; it provides clear direction for this situation. This contract language does not address any steps for other hiring processes or application to other job classifications. The contract language cannot address these other issues because it can only apply to its members – Community Corrections Workers. Regardless, the Union filed the grievance because it believes the Employer violated Article 13.1 by conducting the Correctional Officer Job Mobility (Joint Exhibit 11) process at the same time it conducted a process under 13.1.

The grievance and arbitration processes are intended for issues that arise out of contract interpretation and application where parties disagree. There is nothing to disagree about in this situation. The language contained in Article 13.1 is a clear acknowledgement by the Union that hiring/staffing decisions fall within the Employer's management right to direct its workforce, and that the Union will not infringe on this right.

The Union presented no evidence during the hearing to support its claim. In fact, by its own witness testimony, through questioning by the Arbitrator, the Union acknowledged that

there is no language in Article 13.1 that: 1) prohibits the Employer from considering other candidates that have the necessary qualifications for the position; 2) prohibits the Employer from conducting simultaneous selection processes; 3) prohibits the Employer from interviewing other candidates at the same time the CCWs are being interviewed; or, 4) requires the employer to exhaust all steps in Article 13.1 before considering candidates from other job classifications.

This issue should never have been brought to arbitration as it is not grievable under the CBA. The contract language stating the outcome of the CCW lateral transfer process in Article 13.1 of the CBA is very clear and leaves no room for any other interpretation. The Union gave up its right to grieve this provision when it agreed to the contract language. Now it is attempting to challenge the Employer's management right to select and direct its workforce. Arbitration is an inappropriate venue to make such an attempt – that should occur through the negotiation process. If the rights of management are going to be forfeited it should be with the consent of management.

The Employer has met its burden of proof. The Corrections Department did not violate any contract provisions or departmental policies as alleged by the Union. The employer followed the steps of Article 13.1 in the selection process for the CCW – COG position; it also followed the requirements of the Correctional Officer Career Mobility policy – the policy that applies to the selection process. Having demonstrated that the grievance is not arbitrable, and that the Employer did not violate policy in conducting the selection process, the Employer requests that the grievance be denied.

VIII. ANALYSIS AND FINDINGS

ISSUE B. WHETHER THE EMPLOYER BREACHED ARTICLE 13.1 OF THE COLLECTIVE BARGAINING AGREEMENT BY IMPLEMENTING AN ALTERNATIVE PROCEDURE FOR PROCESSING VACANCIES FOR LATERAL TRANSFERS IN THE GRIEVANT BARGAINING UNIT?

The Employer's Authority to Unilaterally Waive, Amend, Alter, or Eliminate County Policies Which Impact the Rights of Grievant Under the CBA Does Not Exist.

Corrections is a unique work environment. Every Corrections entity has a policy which allows such employers to temporarily suspend compliance with the CBA. The unique needs of the industry requires such authority when supervening events such as but not limited to: threats to staff, inmate unrest, public safety, natural disasters, critical equipment failure, medical emergencies, and other un-foreseeable events that might loose a population society has intentionally segregated.

This power to temporarily suspend the CBA is strictly regulated. The Corrections employer is required to demonstrate in writing that compliance with its CBA was not possible contemporaneous with the perceived threat or as soon thereafter as possible. Such authority is temporary and ends when the threat passes. After a through search of arbitral literature, one finds no instance where a Corrections employer has attempted to use a suspension of compliance clause to change a hiring procedure or to assume permanent, un-reviewable authority over rights in its CBA.

In this case, County Policy 1.3 is the suspension of compliance clause. Here, it is called the Request for Exception and states:

"Exceptions: In the event that compliance with a departmental policy cannot be met for whatever reason, a Request for Exception shall be completed and submitted by a deputy director or superintendent to the Director for consideration.

The director alone can grant such exceptions or issue a direction contrary to the requirements of any departmental policy.”

This policy is triggered only when compliance with a departmental policy cannot be met for whatever reason. Policy 1.3 mandates, “shall,” a written Request detailing the reasons that compliance with established policy cannot be made. The Request shall be submitted to the Director of the Department for consideration. The Director must make a decision in writing approving or disapproving the Request. The Request and the Director’s response should be available to an Arbitrator reviewing the Employer’s action.

Here, the Employer did not make even colorable compliance with Policy 1.3. There was no demonstration that the provisions of County Policy 2.2 could not be met. There was no memo to the Director for consideration of the reasons compliance could not be had. There was no written decision by the Director approving or disapproving the Request, and no record for an Arbitrator to review. The Director also “waived” her compliance with Policy 1.3.

The Exception is not triggered when the Employer just does not want to comply with the negotiated procedure for processing lateral transfers in the Grievant Bargaining Unit. The Employer is incorrect in its belief that a waiver authority and a Request for Exception are the same. Therefore, any actions taken pursuant to the Employer’s mis-interpretation of Policy 1.3 are violations of the CBA.

The Employer has confused the authority to temporarily suspend compliance with the CBA for a supervening event with omnipotence. County Policy 1.3, is not authority to “unilaterally waive, amend, alter, or eliminate Department policies at the discretion of the Director in the best interest of the Department.” Even the most liberal interpretation of Policy 1.3 could not find such standardless authority. No such waiver authority exists in the CBA, County Policies, or in any reserved management rights.

Nor did the Employer cite any other situation in the history of the Department where a “waiver” authority has been used in the past. The concept of such authority, outside the supervening events named above, is not documented in labor relations history for good reason. Why would the Parties negotiate a labor agreement and then allow one Party the power to unilaterally waive, amend, alter, or eliminate policies which implement the CBA Articles just negotiated? Nothing supports the Employer’s belief that the Director can exercise omnipotence over County Policies and thus over the CBA.

Where the brick begins, management powers are limited. Management’s right to direct the procedure for lateral transfers is limited to the procedure agreed to in Article 13.1 and detailed in County Policy 2.2. Article 13.1 procedures are the only procedures that may be used to process applicants for vacancies in the CCW class. The procedures in Article 13.1 must be exhausted before the Employer can move to the secondary selection options in Article 13.1 and Policy 2.2. In addition, the Employer may not dilute the pool of CCW applicants applying for lateral transfers with other applicants not entitled to be in the pool.

Lastly, the Employer may not run simultaneous searches in other bargaining units to fill lateral transfers in the CCW class before exhaustion of the procedure in Article 13.1. The CBA procedure preempts the field. By setting out the exclusive method for processing lateral transfers for the Bargaining Unit, all other methods are inapplicable. The Employer cannot fill in perceived contract silences with alternatives directly at odds with the written provisions of the CBA. There are no silences in the intent of the CBA.

The Employer advances two reasons to justify its actions, neither of which meets the standard required in Policy 1.3 as reasons that demonstrate compliance with Policy 2.2 could not be met. First, that the CCW pool of three applicants was too small. Unfortunately, the Employer

did not produce empirical evidence showing why three applicants were too few when smaller pools in recent CCW lateral transfers have been acceptable. County Policy 2.2, in the Interviewing Section, outlines interviewing procedures when there is only one CCW in the applicant pool so small pools were contemplated in the regulatory scheme. Nor did the Employer produce empirical evidence that supports its contention that a hiring pool of five is better than a pool of three.

The second reason the Employer advanced for attempting to “waive” the CBA procedure is that the Employer wanted different skills than those in the pool of CCW applicants alone. It is interesting to note that the Employer decided that different skills were necessary after reviewing the applications in January, 2012, but before interviewing any candidates.

Both of these arguments are arbitrary and capricious. Based on those reasons, the Employer’s decision to alter the hiring procedures for lateral transfers in the Grievant class was an abuse of the Employer’s discretion. The purported “waiver” authority was born out of frustration with a cumbersome and expensive hiring process. However, inventing a magic wand is not the remedy. This is the hiring process that the Employer agreed to perform in January, 2012.

This is a dispute about how the latter transfer of CCWs should be processed. The Parties agreed in the CBA on January 1, 2012 that the procedure in Article 13.1 should govern those situations. The Employer’s Policy 2.2 details that agreement. In a prior grievance, almost identical to this one, a CO was erroneously included in a CCW lateral transfer search. Although the CO was awarded the position, the Employer rescinded the offer of employment when the Union filed a grievance. It is unreasonable for the Employer to now argue that newly discovered extraordinary power exists in County Policy 1.3 which allows the Director to reach a different

result based on her view of the “best interests of the Department.” Fortunately, the Employer cannot waive the requirement that standards be consistently applied.

Agreements made at the negotiating table are no slight matter. Such agreements are enforceable promises that an Arbitrator is obligated to uphold. Although the Employer has impermissibly attempted to confer on itself omnipotence to override policies which impact rights under the CBA, no such authority exists. There is no “waiver” provision in the CBA or County Policies.

Any other **holding** would produce disastrous results. If one extrapolates the Employer’s imagined power to unilaterally waive, amend, alter, or eliminate County Policies impacting rights under the CBA, one is frightened at the prospect. Can the Employer waive County Policies that implement Article 8 on Sick Leave? Can the Employer waive those agreements and institute new procedures? Can this “un-reviewable waiver” authority unilaterally alter County Policies implementing Article 12 on Seniority, or Article 17 on Wages? Is the “waiver” power permanent? What are the standards, if any, for use of the “waiver” authority? The Employer was not forthcoming on any of these questions.

It is apparent then that to uphold a non-existent authority to ‘waive’ the Employer’s compliance with its own policies would eviscerate the CBA.

This is the purpose of County Policy 2.2:

“To encourage and support employees’ career growth and development and to ensure that 1) any vacancy or newly created position shall be filled and posted in accordance with the provisions of the bargaining agreement...2) that the hiring process and hiring decisions for lateral transfers are based on articulated standards, principles, and procedures that are transparent, applied consistently, and provide equitable opportunities of all employees.”

If the Employer can “unilaterally waive, amend, alter, or eliminate” Policies with un-reviewable discretion, what becomes of the expectations for articulated, transparent, consistently applied, and equitable hiring standards?

IX. FINDING OF FACT AND CONCLUSION OF LAW

FINDINGS:

1. The Employer conducted a hiring process for the Cog Coordinator vacancy that violated the procedural rights of the Grievant Bargaining Unit under Article 13.1 of the CBA. The Successful Applicant was not currently employed in a position requiring the same minimum standards as those held by the members of the Grievant Bargaining Unit.
2. The Employer’s management authority to conduct the hiring process for lateral transfer in the Grievant Bargaining Unit is limited by the negotiated procedure in Article 13.1.
3. The Employer ceded, or surrendered, its authority as the sole decision-maker in hiring procedures for lateral transfers in the Grievant Bargaining Unit at the negotiating table.
4. The procedures mandated in Article 13.1 must be exhausted before the search for lateral transfers can move to County Policy 2.5.
5. County Policies are pendant to the CBA. They are not separate and independent sources of authority. County Policies are reviewable when inconsistent or implemented inconsistently with the express provisions and intentions of the CBA.
6. County Policy 1.3, a Request for Exception, is not authority to “unilaterally waive, amend, alter, or eliminate” the Employer’s compliance with the Policies that implement provisions of the CBA. No such authority exists in the Parties documents, nor did the Employer produce a reference or evidence of past use of such authority.
7. The Employer failed to demonstrate that it could not comply with the provisions of County Policy 2.2; did not prepare a Request for Exception to compliance for the Director’s review; and the Director did not produce a writing detailing the necessity for substituting her own lateral transfer procedure for the obligatory procedure in Article 13.1.
- 8 The reasons advanced by the Employer for the necessity of a substitute procedure are arbitrary, capricious and abuse the discretion of the Employer in implementing lateral transfers in the Grievant Bargaining Unit.

X. AWARD

After study of the testimony and other evidence produced at the hearing, on the arguments of the parties (in post-hearing written briefs) on that evidence in support of their

respective positions, and on the basis of the above discussion, summary of the testimony, analysis and conclusions, I make the following award:

1. The Employer shall rescind the offer of employment extended to the Successful Candidate for the Cog Coordinator position;
2. The Employer shall declare the position vacant; and
3. If the Employer chooses to re-post this position, it shall conduct a hiring process pursuant to the provisions of County Policy 2.2 and fully consistent with Article 13.1 of the CBA.

Respectfully,

Dated: 10/31/13

_____/s/_____
Bernice L. Fields, Arbitrator